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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

EDMUND G. BROWN, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR HEALTHCARE ASSOCIATION OF NEW YORK STATE, INC., NEW YORK ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., NEW YORK STATE HEALTH FACILITIES ASSOCIATION, INC., NYSARC, INC. AND UNITED CEREBRAL PALSY ASSOCIATIONS OF NEW YORK STATE, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether California Assembly Bill No. 1889, Cal. Gov't Code §§ 16645.2, 16645.7, is preempted by the National Labor Relations Act.

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This *amici curiae* brief is submitted in support of petitioners.[1]

INTEREST OF AMICI

Healthcare Association of New York State, Inc. ("HANYS") is a not-for-profit trade association which represents over 550 not-for-profit and public hospitals, nursing homes, home health agencies, hospices and other similar health care providers throughout New York State.

New York Association of Homes and Services for the Aging, Inc. ("NYAHSA") is a not-for-profit membership corporation that represents over 650 not-for-profit and publicly sponsored nursing facilities, home care agencies, adult care facilities, assisted living providers, continuing care retirement communities, senior housing facilities, adult day care providers, and other community services agencies serving people of all ages throughout New York State.

New York State Health Facilities Association, Inc. ("NYSHFA") is a not-for-profit trade association whose membership consists of nearly 300 residential health care facilities, which meet the definition of a "nursing facility" as defined in 42 U.S.C. § 1396r(a).

NYSARC, Inc. ("NYSARC") (formerly known as New York State Association for Retarded Children)

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

is a New York not-for-profit membership organization founded by parents, families and friends of persons with mental retardation and other developmental disabilities to provide advocacy to and services for persons with mental retardation. NYSARC is a single corporation that operates statewide through its chapters located in 61 out of 62 New York counties. The county chapters operate a variety of programs that provide services for persons with mental retardation and other developmental disabilities.

United Cerebral Palsy Associations of New York State, Inc., d/b/a Cerebral Palsy Associations of New York State, ("CPNYS") is a New York not-for-profit corporation that directly provides residential, clinical, health, medical, rehabilitation and habilitation education and other services to individuals with developmental disabilities and their families, and serves as a statewide association of providers of like services. As a statewide association, it represents 22 separately incorporated affiliates providing programs and services in every county of New York State. As a direct provider of services, CPNYS itself operates approximately 90 community residences, in addition to day programs and diagnostic and treatment centers providing the full range of health, clinical and habilitative services, and transportation services.

HANYS, NYAHSA, NYSHFA, NYSARC and CPNYS all provide advocacy, education and litigation services for their members. The Amici associations themselves or their members, chapters and affiliates all receive funds to pay for services rendered, some of which funds, at one time, have been appropriated by the State of New York. Principal among such funds are medical assistance ("Medicaid") pay-

ments.

Virtually all of the members of the Amici associations participate in New York's Medicaid program, which comprises federal, state and county funding. Many of Amicis' members receive almost 100% of their funding from the Medicaid program, and all receive very substantial amounts of Medicaid reimbursement. They also receive other funding that might be considered to be "state funds." Amicis' members also receive payments from other governmental bodies, including counties, cities and school districts.

Presently, Medicaid and other payments made to the Amici and their members by the State may be subject to a New York statute, N.Y. Labor Law § 211-a, which operates similarly to AB 1889, and which is the subject of a similar challenge. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006). In addition, local counties in New York State in which many of Amicis' members do business have now also enacted local laws that operate similarly to AB 1889, but impose different standards, accounting and reporting rules, and sanctions.

Many of the Amicis' members, particularly hospitals, also treat patients from other states, and bill and receive payment from those states' Medicaid programs. Therefore, they are at least presently, or likely will become, subject to multiple state, county and municipal laws that, like AB 1889, will directly but differently limit or completely defeat their ability to express their viewpoints, or otherwise participate in, union organizing campaigns. The Amici, therefore, have a significant interest in the resolution of

the question whether AB 1889 is preempted by the NLRA.

SUMMARY OF ARGUMENT

AB 1889 is preempted by the National Labor Relations Act (NLRA) because it regulates speech that Congress intended to leave unregulated. That preemption argument, however, will not be made here, because it is fully addressed in Petitioners' and other amicus briefs. Here, Amici assert that AB 1889 is also preempted because it regulates non-coercive and coercive employer speech that are arguably protected or prohibited by the NLRA.

A. AB 1889 is preempted because it regulates speech protected by the NLRA. Section 8 does more than just incorporate First Amendment protections of speech. It creates rules unique to the labor context, as to what speech is protected and what speech may be sanctioned.

B. AB 1889 is preempted because it regulates coercive employer speech that is within the primary jurisdiction of the National Labor Relations Board (NLRB).

C. Absent preemption, AB 1889 and similar laws that have been or could be enacted in other states, counties and municipalities, will result in a patchwork of different governmental restrictions on spending on labor activities that will wreak havoc on the goal of a uniform national labor policy, as embodied in the NLRA.

ARGUMENT

POINT I

AB 1889 IS PREEMPTED UNDER *GARMON*

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), this Court stated "[w]hen the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." *Id.* at 243. Conduct that falls within the parameters of being protected under section 7 or an unfair labor practice under section 8, is conduct "so plainly within the central aim of federal regulation" that it must be preempted. *Id.* at 244.

Even if it is not clear that an activity is neither protected nor prohibited by the NLRA, "[t]he governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." *Id.* at 246. Thus, states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986).

A. Protected by the NLRA

1. Section 8(c) Protects Speech

The Ninth Circuit's rejection of *Garmon* preemp-

tion (*Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1091 (9th Cir. 2006) (*en banc*)) on the ground that section 8(c) provides no affirmative grant of speech rights, views the NLRA too narrowly. The Second Circuit rightly rejected this analysis, emphasizing that section 8(c) is not "a mere place-holder with no labor law function of its own" (471 F.3d at 97), and that section 8(c) does itself protect employer speech, and state action impinging on this protection may be preempted under *Garmon*. *Id.*

It is significant that the form of protection in section 8(c) is stated in the negative - - that non-coercive speech will not constitute an unfair labor practice or be evidence of one. As seen in other contexts, that is a broader protection than one which actually enumerates the types or limits of protected speech. The breadth of the First Amendment's protection of freedom of speech is found in its prohibition of laws restricting speech, not in any affirmative grant itself. U.S. Const. amend. I. The broad powers states draw from the U.S. Constitution are not delineated. They are the reserved powers - - all those not specifically delegated to the federal government under Article I, § 8, or prohibited to the states under Article I, § 10. *See* U.S. Const., Amend. X.

The absence of an affirmative protection of speech is, therefore, inconsequential. The protection of speech found in section 8(c) is a function of the NLRB's jurisdiction to find and remedy unfair labor practices. That the right to freedom of speech derives from the federal constitution does not mean that its exercise is not protected by the NLRA,

through the National Labor Relations Board. Exempting non-coercive speech from constituting or being evidence of an unfair labor practice is a protection of that speech in the broadest possible terms in unfair labor practice proceedings.

2. AB 1889 Regulates Speech

According to Respondents and the Ninth Circuit, if AB 1889 does nothing more than further the State of California's interest in assuring proper use of its own funds, then it does not seek to regulate employer speech at all, and would not be preempted. On the other hand, if the statute does interfere with the employer's ability to participate fully in the election processes, it is preempted under *Garmon*, because even the State's exercise of its spending power does not insulate such interference from a preemption challenge. *Wisconsin Dept. of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 202, 287 (1986). Thus, the question becomes whether AB 1889 "is aimed at making sure that State funds are only spent on the purposes the State has chosen, or whether, instead, the State has used its spending power to restrict the associations' protected speech beyond their dealings with the State." *Healthcare Ass'n, supra*, 471 F.3d at 102.

Respondents' argument regarding the State's spending power fails for the following principal reasons:

1. AB 1889 has nothing to do with the State's spending power. The money targeted is not the State's funds. It is the employer's, and the only rela-

tionship of these funds with the State is that some of the money that the employer has received was at one time or another paid out of the state treasury. In most cases, particularly in the context of Medicaid programs, employers are reimbursed for items sold or for services already rendered;

2. The only activity that is prohibited by AB 1889 is the expenditure of the employer's own funds on activities that are federally protected, and that further the goals of the National Labor Relations Act;

3. Expenditures by the employer on these labor activities have no effect whatsoever on what the State spends. The State's costs are determined by its contracts, so whether the State is reimbursing for medical care or for the purchase of some other good or service, the State pays the same regardless of how the employer uses its money;

4. The statute does nothing whatsoever to direct how the employer is to use its funds, even state-appropriated funds. The employer can invest it, gamble it away, or give increased wages to union workers. The only thing it cannot do with its money is that which Congress considers to be in the public interest -- to participate in the robust debate encouraged by the NLRA.

Despite the statute being directed at the employer's own funds, despite the statute restricting expenditures of private funds only in the case of activities protected by the NLRA, and despite the statute not requiring expenditures for any specific pur-

pose, the Ninth Circuit relies on *Rust v. Sullivan*, 500 U.S. 173 (1991), for the proposition that "California's refusal to subsidize employer speech" does not regulate employer activity, and employers remain free to use their own funds for advocacy purposes (463 F.3d at 1092).

In *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 541 (2001) this Court clarified its holding in *Rust*, stating:

> The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding. . . . As we said in *Rosenberger*, "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." (internal citations omitted).

AB 1889, like its New York State counterpart, Labor Law § 211-a, disseminates no governmental message. With respect to Medicaid programs, the purpose of the expenditure is not to convey a state message, but to care for the needy, and more specifically, to pay third parties like Amicis' members who provide such care to the needy. The statute is not directed at any state expenditures made to convey a

message that AB 1889's prohibitions are necessary to protect from being garbled or distorted.

Moreover, the existence of a government "subsidy" does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity or have been expressly dedicated to speech activity. *Rust*, 500 U.S. at 199-200, *citing Hague v. CIO*, 307 U.S. 496, 515 (1939). There can be no doubt that in the category of public forums, the process of unionizing under federal law clearly and unequivocally involves important rights of free speech, adversarial debate and persuasion. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943); Thomas v. Collins, 323 U.S. 516 (1945), *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[2]

AB 1889 does not further any state interest of ensuring that state funds are used for the purpose for which they were appropriated, as it only prohibits one type of expenditure and leaves employers free to spend such funds on any other unrelated, or even frivolous, expense. AB 1889 only regulates employer advocacy. Furthermore, AB 1889 has nothing whatsoever to do with how the State spends its money, or

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[2] Both the Second Circuit and the Ninth Circuit erred insofar as they held that *Garmon* preemption could not apply to grant funds (463 F.3d at 1096; 471 F.3d at 105). If the grant defines the purpose for which the funds must be used, then a restriction against use for labor advocacy is meaningless, because the money cannot be used for that purpose anyway. If the grant is not restricted in any way, then imposing a singular restriction on employer advocacy in a labor context, when the funds can be used for any other purpose, whether frivolous or not, amounts to nothing other than a purposeful restriction on employer speech.

how much of it is spent.

The fact is that AB 1889 has no effect upon what goods or services are purchased by the State, nor how much the State pays for those goods and services. The reality is that AB 1889 has nothing to do with the State's spending power. The statute, as does its New York counterpart, Labor Law § 211-a, regulates the employer's spending, and it exercises that control over the employer's own money -- money the employer lawfully and contractually earned by selling some goods or services to the State. The proprietary interest in the funds, therefore, is exclusively the employer's, not the State's. The statute is directed solely at the ability of the employer to advocate in an organizing campaign. The Court in *Lockyer II* (422 F.3d 973 [2005]) accurately recognized that the statute "commandeers employers' own money and dictates to these private employers how they shall spend their money." *Id.* at 980. Thus, AB 1889 is not a statute, as in *Rust*, that conditions receipt of grant funds to further a state's expressed message or program. The challenged provisions do not begin to operate until the funds have been earned by the employer and ownership has changed hands.

Respondents' professed proprietary concerns mask a regulatory decision similar to that held preempted in *Gould*. Here, California is using its legislative power to deter the exercise of federal free speech rights that reflect Congress' and the NLRB's judgment that robust debate fosters informed employee choice. The same speech that Congress sought to safeguard, California attempts to stifle. In

seeking to change labor policy, California has impermissibly assumed a regulating role that is reserved for Congress and the NLRB. *Gould*, 475 U.S. at 291. For that reason, it is preempted under the *Garmon* rationale.

B. Prohibited by the NLRA

Regardless of whether section 8 protects non-coercive speech, there is no doubt that the NLRA prohibits coercive speech. AB 1889 is preempted because it interferes with employer speech that may influence employee decisions. It is the NLRB, however, that has primary jurisdiction to decide whether speech is coercive and to regulate that speech.

The Ninth Circuit's application of the identicality test in *Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978), is flawed. 463 F.3d at 1092-93. In *Local 926, Int'l Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669 (1983) this Court considered whether a state cause of action alleging unlawful interference with an employment relationship, and an NLRB charge that rests on coercion, were sufficiently similar to threaten the NLRB's primary jurisdiction.

Distinguishing *Sears*, which dealt with an action for trespass and a challenge only to the location of union picketing, this Court held in *Operating Engineers* that "the federal and state claims are thus the same in a fundamental respect," *id.* at 682, and the "risk of interference with the Board's jurisdiction is

thus obvious and substantial." *Id.* at 683.[3]

As in *Operating Engineers*, the likelihood of overlapping jurisdiction between the NLRB and the California state courts in interpreting and enforcing AB 1889 is evident, as it is commonplace for the NLRB to determine the extent to which speech that "influences" rises to the level of coercion. *See, e.g., Industrial Hard Chrome Ltd.*, 2007 N.L.R.B. Lexis 75 [threats of discharge were unfair labor practices]; *United States Recycling & Disposal, LLC*, 2007 N.L.R.B. Lexis 495 [threatened loss of overtime violated section 8(a)(1)]; *The Levy Co. and Int'l Union of Operating Eng.*, 2007 N.L.R.B. Lexis 531 [statements were influential, but because accurate, were not objectionable]; *Southern Monterey County Hosp.*, 2006 N.L.R.B. Lexis 446 [coercive speech].[4]

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[3] Rejecting the argument that preemption fails because the NLRB proceeding rests on coercion, and the state's claim on causation, this Court stated; "permitting state causes of action for non-coercive interference with contractual relations to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or non-coercive, and thus the proper subject of a state suit." 460 U.S. at 682.

[4] Compare *Crown Cork & Seal Co. v. NLRB*, 308 U.S. App. D.C. 326 (1994) (employer letter stating that "we will not bring work into this plant -- and our customer will seek other alternatives -- if that work can't be done at a reasonable cost, a cost that allows both of us to make a fair return on our investment" was not an unfair labor practice, because it was based on objective facts) with *Allegheny Ludlum Corp. v. NLRB*, 323 U.S. App. D.C. 6 (1997) (employer newsletter stating that "despite very difficult circumstances in the past, 'the Company found ways to manage the situation without resorting to layoffs of salaried employees' and quoting an interview with a former

AB 1889 is preempted, therefore, because it interferes with the NLRB's primary jurisdiction over activities that are protected or prohibited, or arguably protected or prohibited, by the National Labor Relations Act.

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union member saying 'if it came to a layoff due to a lack of work, the first people to be laid off would be those in a Union,'" was an unfair labor practice because it constituted a threat of layoffs).

POINT II

AB 1889 AND SIMILAR LAWS WILL EVISCERATE THE UNIFORMITY EMBODIED IN THE NATIONAL LABOR RELATIONS ACT

As discussed at Point IV of Petitioners' Brief, the "purpose of the [National Labor Relations Act] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" *Garner v. Teamsters Union*, 346 U.S. 485, 490." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971); *Garmon, supra*, 359 U.S. at 242-43. This Court has recognized the importance of preserving a uniform federal system in analogous contexts. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (holding a Pennsylvania antisubrogation law preempted, because "[a]pplication of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide."); *United States v. Locke*, 529 U.S. 89, 108 & 111 (2000) (finding a Washington State restriction on oil tankers preempted even though the statute "preserved the role of the States to regulate local ports and waters ... [because] [e]nforcement of the state requirements would at least frustrate what seems to [the Court] to be evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.")

Petitioners accurately predict that, if legislation such as AB 1889 is left unchecked by this Court, the

outcome will be a proliferation of different and potentially incompatible state, county and municipal laws governing activity and advocacy central to NLRA processes. This outcome is not just theoretical; it is being vigorously pursued and effectuated at both the state and local governmental levels.

After AB 1889, drafted and sponsored by the Intervenor California Labor Federation, AFL-CIO (J.A. 306), was enacted by California in 2000, New York passed a different statute in 2002, but which seeks to achieve the same result as AB 1889. As noted above, N.Y. Labor Law § 211-a is being challenged in *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006).[5] Petitioners have already identified several other statutes at footnote 10 of their Brief that are designed to restrict employer speech, almost all of which date from the late 1990s.[6]

Organized labor's efforts have not been limited to the state level, as exemplified by the county ordinance found preempted by the NLRA in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee*

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[5] While the New York Legislature does not publish information on the origins of a particular bill as California does, the press reported that New York's legislation was introduced "at the urging of the politically influential Service Employees International Union, which organizes hospital workers, and the 2.5 million member AFL-CIO." *See U.S. Court Rejects California Labor Neutrality Law*, Albany Times Union, Sept. 27, 2002.

[6] An exception is Cal. Welf. & Inst. Code § 4638, enacted in 1982; this statute is distinguishable from the present day initiatives, in that it contains an explicit qualification that "[n]othing in this section shall be construed as limiting the employers rights under Section 8(c) of the National Labor Relations Act." *Id.*

County, 431 F.3d 277 (7th Cir. 2005). While it is much more difficult to conduct a broad search of local ordinances, Amici associations have been able to identify a number of relatively recent local laws which, like AB 1889, seek to deprive employers of the resources necessary to exercise their advocacy rights under the NLRA. They do so, however, using different terms, encompassing different funds, targeting different activities, imposing different reporting and accounting obligations, and threatening different sanctions. These local laws, whose draconian ordinances in some ways exceed AB 1889's, emanate from well-populated counties like Suffolk and Nassau in New York State,[7] to small towns like Fairfax, California, whose population is estimated to be just over seven thousand people.[8]

The 10 local ordinances that the Amici have been able to identify are:

Counties	Law / Ordinance	Year Passed
Allegheny, PA	86-01	2001
Los Angeles, CA	Title 2, § 2.201.050(B)	1999
Marin, CA	Part 3435, § 2.50.130	2005
Nassau, NY	Misc. Laws, Title 56	2003
Santa Cruz, CA	Title 2, § 2.122.130	2001
Suffolk, NY	Part IV, Chapter 466	2003
Ventura, CA	Div. 4, Chp. 9.5, § 4962	2001

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[7] The United States Census Bureau estimates the population of each county as well in excess of 1 million people. *See* Fact Sheets at http://factfinder.census.gov

[8] See United States Census Bureau Fact Sheet at http://factfinder.census.gov

Cities and Towns	Law / Ordinance	Year Passed
Fairfax, CA	Title 8, § 8.56.120	2002
Pittsburgh, PA	Art. VII, § 161.35(l)[9]	2001
Watsonville, CA	Title 2, Chp. 5, § 2-5.13	2002

Thus, the uniformity of the NLRA has been threatened not just by the possibility of 50 different states enacting laws like AB 1889, but also by innumerable counties and cities. Nor would there be any restriction on school districts imposing similar rules, such as for private schools that are funded to meet the districts' obligations to provide free appropriate public education under the Individuals with Disabilities Education Act. 20 U.S.C. §§ 1400 *et seq.*

Organized labor's concerted efforts to use the political process to alter the careful balance of employer and union rights under the NLRA by securing employer neutrality has been well-publicized. *See* Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 Berkely J. Emp. & Lab. L. 369, 373 & 379 (2001):

> Union leaders regard employer anti-union speech as a leading cause of union organizing failure, particularly when orchestrated by labor-management consultants.

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[9] The editor of the compilation of Pittsburgh's code noted that "Am. Ord. 13-2001, §§ 1--17, effective Jan. 1, 2002, amended the Code by adding provisions designated as § 161.33. Inasmuch as there already exist provisions so designated, Am. Ord. 13-2001 has been codified herein as § 161.35 at the discretion of the editor."

...

> One of the most important ways a union secures a neutrality agreement is when a state or local government requires one from a private sector employer.

The reason for this political tact is that "substantial empirical literature in industrial relations establishes employer opposition as a major contributor to union losses in certification elections and, ultimately, to the decline of the unionization rate in the United States." Adrienne E. Eaton and Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 43, 46-48 (2001).

It is evident that a patchwork of different state and local laws that will impair the ability of participants in the NLRA processes to exercise their full panopoly of rights has not only gained a foothold in the two most populous states and at least 10 local governmental units, but, absent a preemption finding, will undoubtedly spread across the country, leading to the "incremental diminishment" of the Board's control over enforcement of the NLRA that this Court in *Wisconsin Dep't of Indus., Labor & Human Rels. v. Gould, Inc.* 475 U.S. 282 (1986) sought to prevent. The complexities imposed by multiple, inconsistent state and local laws threaten not just the national uniformity of labor relations and the primary jurisdiction of the NLRB, but they also create an enormous burden on employers operating in or deriving payment for goods or services from multiple states or municipalities.

This burden on the NLRA and employers is heightened by the different standards, applicability, reporting and accounting requirements, and sanctions imposed by these various laws. For example, in AB 1889 the operative language is "assist, promote, or deter union organizing," which is defined as:

> ... any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following:
>
> (1) Whether to support or oppose a labor organization that represents or seeks to represent those employees.
>
> (2) Whether to become a member of any labor organization.

Cal Gov Code § 16645 [10]

In contrast, the operative language of the other existing neutrality laws is as follows:

- Cal Wel & Inst Code § 4638: "directly related to influencing" [not defined].
- New York Labor Law § 211-a(2): "encourage or discourage" [not defined].
- New York Labor Law § 704(11): "to discourage" [not defined].
- New York Soc Serv Law § 336-f(h): "encourage

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[10] At present, these laws are all pro-union, and restrict only employer activity. Absent a finding of preemption, however, nothing precludes states that might be more business-oriented from imposing similar restrictions on union activities instead, so long as they receive, directly or indirectly, some state funds.

or discourage" [not defined].

- ORC Ann. § 5119.62(C): "purpose of influencing"; "influencing" defined as "discouraging employees from seeking collective bargaining representation or encouraging employees to decertify a recognized collective bargaining agent."
- Allegheny County Ordinance 86-01: "support or oppose" [not defined].
- Los Angeles County Code § 2.201.050(B): "to hinder, or to further" [not defined].
- Marin County Living Wage Ordinance § 2.50.130: "to hinder, or to further" [not defined].
- Nassau County Misc. Laws, Title 56, §§2(A), 3: "Assist, Promote or Deter Union Organizing," defined as "any attempt by an employer to influence the decision of its employees in the County of Nassau or those of its subcontractors regarding either of the following: 1.) whether to support or oppose a labor organization that represents or seeks to represent those employees; and 2.) whether to become a member of any labor organization.
- Santa Cruz County Code § 2.122.130: "not hinder or further" [not defined].
- Suffolk County Law §§ 466-2, 466-3: same as Nassau County, *supra*.
- Ventura County Ordinances § 4962: "to hinder, or to further" [not defined].
- Fairfax Municipal Ordinances § 8.56.120: "not hinder or further" [not defined].
- Pittsburgh Code of Ordinances § 161.35(l): "to

support or oppose" [not defined].

- Watsonville Municipal Code § 2.5.13: "not hinder or further" [not defined].

The multiplicity of operative terms used by these state and municipal laws virtually assures inconsistent interpretation and enforcement. Even terms that are similar, *i.e.* "to influence" [AB 1889], "directly related to influencing" [Cal Wel & Inst Code § 4638] and "purpose of influencing" [ORC Ann. § 5119.62(C)], may be interpreted differently by different regulatory agencies and courts in different jurisdictions. This Court has already noted the difficulty of interpreting the term "influence" in *Carlson v. California*, 310 U.S. 106, 109 (1940), in which the Court reviewed on a constitutional challenge a Shasta County Ordinance that prohibited, in relevant part, any picketing:

> ... for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from entering any such works, or factory, or place of business, or employment, or for the purpose of inducing or influencing, or attempting to induce or influence, any person to refrain from purchasing or using any goods, wares, merchandise, or other articles, manufactured, made or kept for sale therein ...

The Court noted that "the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in

publicizing the facts of a labor dispute." *Id.* at 112.

These laws also vary widely with respect to their monetary thresholds. Some have no thresholds, *i.e.* Cal Gov Code § 16645.2, Cal Wel & Inst Code § 4638, New York Labor Law § 211-a, New York Labor Labor § 704(11), New York Soc Serv Law § 336-f(h), ORC Ann. § 5119.62(C), Allegheny County Ordinance 86-01, Los Angeles County Code § 2.201.050(B), Marin County Living Wage Ordinance § 2.50.130, Santa Cruz County Code § 2.122.130, Ventura County Ordinances § 4962, Fairfax Municipal Ordinances § 8.56.120, Pittsburgh Code of Ordinances § 161.35(l), Watsonville Municipal Code § 2.5.13, while others have varying minimum monetary triggers for enforcement. *See*, Cal Gov Code § 16645.7(a) [$10,000], Nassau County Misc. Laws, Title 56, § 2(C) [$50,000] and Suffolk County Law § 466-2 [$50,000]. As other states and municipalities adopt their own laws, it will become increasingly difficult for an employer to identify which laws it might become subject to, and what their restrictions are. Nassau and Suffolk, for example, are neighboring counties on Long Island, in New York State, and many of Amicis' members do business with and derive funds, such as Medicaid payments, from both counties. Thus, a hospital on Long Island already has to comply with the different restrictions imposed by the State of New York in Labor Law § 211-a, and also the Suffolk and Nassau counties' ordinances.

There is a similar complication as a result of the terms used by these restrictive laws to define what funds are subject to the restrictions:

- Cal Gov Code §§ 16645.2 & 16645.7: "state

funds".

- Cal Wel & Inst Code § 4638: "state funds".
- New York Labor Law § 211-a: subsection (2) "monies appropriated by the state"; subsection (3) "funds appropriated by the state".
- New York Labor Law § 704(11): "state funding".
- New York Soc Serv Law § 336-f(h): "public assistance funds".
- ORC Ann. § 5119.62(C): "state funds".
- Allegheny County Ordinance 86-01: "tax dollars".
- Los Angeles County Code § 2.201.050(B): "any consideration".
- Marin County Living Wage Ordinance § 2.50.130: "any consideration".
- Nassau County Misc. Laws, Title 56, §2(D): "County Funds" which are defined as "any monies appropriated by the Nassau County Legislature."
- Santa Cruz County Code § 2.122.130: "expenditure".
- Suffolk County Law §§ 466-2: "County Funds" which are defined as "any monies appropriated by the Suffolk County Legislature."
- Ventura County Ordinances § 4962: "any consideration".
- Fairfax Municipal Ordinances § 8.56.120: "expenditure".
- Pittsburgh Code of Ordinances § 161.35(l): "City funds".

- Watsonville Municipal Code § 2.5.13: "expenditure".

The lack of definitions for these terms is especially significant for employers who receive payments from a joint program, such as the Medicaid program. The Medicaid program is a joint state-federal program established by the federal government to provide health services, including long term care services to poor and needy individuals who qualify under certain state and federal requirements. J.A. 118. A state's participation in the Medicaid program is pursuant to Title XIX of the Social Security Act. Medicaid programs are jointly funded, at least by federal and state dollars.[11] J.A. 260. At least in New York State, and likely in California and other Medicaid programs, it is often impossible for an employer to determine, particularly with the accuracy needed to avoid a violation of a provision such as AB 1889, what portion of any particular Medicaid payment is "state funds" attributable to the state and what portion is federal or county funds which are simply processed by the State (*See Healthcare Assn., supra* at 105).

Likewise, the existing restrictive laws also provide for a wide spectrum of possible penalties, which will not only impair an employer's ability to assess the risks associated with the exercise of its rights under the NLRA, but also create such a threat from

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[11] New York has elected to make the counties ("local social services districts") generally responsible for furnishing medical assistance under the Medicaid program, with State and federal contributions towards the cost of such care. *See*, New York Soc. Serv. Law § 365(1).

multiple jurisdictions' penalties over any speech or spending that employers will be completely chilled from participation. The current restrictive laws provide the following penalties:

- Cal Gov Code §§ 16645.2(d) & 16645.7(d): liability to the state for any funds expended in violation of AB 1889 plus a civil penalty equal to twice the amount of those funds.
- Cal Wel & Inst Code § 4635: cancellation of contract.
- New York Labor Law § 211-a(2): liability for the amount unlawfully expended plus a civil penalty in some cases up to, but not to exceed one thousand dollars or three times the amount of money unlawfully expended, whichever is greater.
- New York Labor Law § 704(11): cease and desist order and other forms of administrative relief.
- New York Soc Serv Law § 336-f(h): ineligibility to participate in public assistance employment programs.
- ORC Ann. § 5119.22(K): civil fine of $100-$500.
- Allegheny County Ordinance 86-01: subject to any penalties provided by the rules of County Manager.
- Los Angeles County Code § 2.201.080(B): damages, liquidated damages and/or termination of the contract.
- Marin County Living Wage Ordinance § 2.50.130: subject to any penalties provided by the rules of the County Administrator.

- Nassau County Misc. Laws, Title 56, §7(A): liability for any funds expended in violation of the law, plus a civil penalty equal to twice the amount of those funds, and debarment from county contracts for five years.
- Santa Cruz County Code § 2.122.110: any or all forms of relief and damages.
- Suffolk County Law §§ 466-7: same as Nassau County, *supra.*
- Ventura County Ordinances § 4960: termination of the contract.
- Fairfax Municipal Ordinances § 8.56.100(D): all forms of relief and damages.
- Pittsburgh Code of Ordinances §§ 161.35(i)(2) & 161.22(b)(10): withholding of payment, termination of contract and/or debarment from bidding or participating in City contracts.
- Watsonville Municipal Code § 2.5.11(b): any or all forms of relief and damages.

Further, reporting and accounting becomes an increasingly burdensome responsibility for multi-jurisdictional employees (J.A. 168). Even if the state or municipal law does not require reporting or separate accounts, it becomes a practical necessity to avoid imposition of punitive sanctions. Thus, employers may have to establish separate accounts and/or report for every jurisdiction, state or local, from which they derive funds. The current reporting requirements are as follows:

- Cal Gov Code §§ 16645.2(c) & 16645.7(c): records sufficient to show that no state funds were used in violation of AB 1889, without

time limit.

- Cal Wel & Inst Code § 4639: annual audited financial statement by an independent accounting firm.
- New York Labor Law § 211-a(3): maintain three years of audited financial records.
- New York Labor Law § 704(11): none.
- New York Soc Serv Law § 336-f(h): none.
- ORC Ann. § 5119.62(C): none.
- Allegheny County Ordinance 86-01: none.
- Los Angeles County Code § 2.201.050(B): none.
- Marin County Living Wage Ordinance § 2.50.130: subject to the rules of the County Administrator.
- Nassau County Misc. Laws, Title 56, §3(I): records sufficient to show that no county funds were used in violation of county law, without time limit.
- Santa Cruz County Code § 2.122.110: annual report.
- Suffolk County Law § 466-3(I): same as Nassau County, *supra*.
- Ventura County Ordinances § 4959: subject to the rules of the Ventura County Chief Administrative Office.
- Fairfax Municipal Ordinances § 8.56.100(A): annual report.
- Pittsburgh Code of Ordinances § 161.35(l): none.
- Watsonville Municipal Code § 2.5.11(a): an-

nual report.

Given the acknowledged difficulty employers already face in navigating the labor organizing process,[12] it is not hard to imagine that an employer faced with multiple restrictions such as AB 1889 from different jurisdictions will have any practical choice but to forgo its right to participate in the organizing campaign -- the very aim of such legislation.[13] This is especially true because AB 1889, like many of the other state and municipal laws of this type, restricts the ability of employers to hire consultants and/or attorneys to assist the employer in formulating a legal response to the organizing campaign.[14]

AB 1889 and similar statutes will not only create

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[12] See FN 3, *supra*.

[13] The inherent difficulty of having to comply with multiple recordkeeping requirements is exacerbated by the uncertainty of the standards, applicability and sanctions. For example, an employer that is unsure what actions may fall within the "influence" language of AB 1889 will be over-inclusive in what expenditures are tracked or segregated. If an employer, such as Amicis' members, also receives funding through a joint program such as Medicaid, it may need to keep a separate account for those receipts, as it will be impossible to divide the money according to what is state versus federal or county funds.

[14] *See* Cal Gov Code § 16646; *see also, existing laws:* N.Y. Labor Law § 211-a(2)(b); Allegheny County Ordinance 86-01; City of Pittsburgh Ordinance Art. VII, § 161.35(l); *and proposed state statutes*: H.B. 578, §2(3), 2007 Legis., Reg. Sess. (Ala. 2007); H.B. 3267, §1(b) [definition of "employee influence expenditure"], 185th Gen. Ct., Reg. Sess. (Mass. 2007); H.F. 1224, §2(B)(3), 85th Legis., Reg. Sess. (Minn. 2007); H.B. 492, §1 [proposed amended Section 9-4-5117(a)(3)], 105th Gen. Assemb. (Tenn. 2007).

a patchwork of substantive laws, but will also create inconsistencies in their applicability to any particular employer. For example, while Cal Gov Code § 16645.7 provides a threshold level of $10,000 in state funds in any calendar year, N.Y. Labor Law § 211-a applies to any state-appropriated funds, and Suffolk County Local Law § 466-2 applies to any contractor that receives more than $50,000 in funds.

The reach of the various local ordinances or state laws go well beyond even AB 1889's. As an example, the Suffolk County local law previously referenced not only restricts certain uses of funds received from the County, but also provides that at a minimum, a contractor and its subcontractors will be required to execute a neutrality agreement with any potential organizing union. Significantly, if the services are provided on County property employers are also required to enter into an access agreement, a fair communication agreement, a nonintimidation agreement, and a majority authorization card agreement, as those are defined under Suffolk County Law § 466-2.

Rather than a uniform national labor policy that fosters robust debate, state and local laws will incrementally diminish that uniformity until there is such a patchwork of differing, burdensome and oppressive restrictions on and sanctions for an employer's exercise of its rights under the NLRA that most such debate will be stifled, and the Congressional goals embodied in the NLRA will be eviscerated.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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